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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF: INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

Written statement*/ submitted by the Romanian Independent Society of Human Rights, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[9 January 2001]

*/ This written statement is issued, unedited, as received in English and French from the submitting non-governmental organization(s).

GE. *200101025*

ENG

(1) The Romanian Independent Society of Human Rights is a non-governmental organisation set up in 1990 focused on the protection and promotion of human rights and fundamental freedoms. SIRDO's main activities are the legal assistance and support for the disfavoured categories, human rights education and monitoring the way in which the state institutions respect the international obligations. The organisation focuses on research programmes meant to reflect the role of the law. Thus, we point to a phenomenon that may be entitled "Persecution by law."

(2) The law 140/1996 changed the Penal Code and instituted an accentuated repressive penal system, totally opposed to the advanced tendencies for the promotion of alternative means to the deprivation of liberty, to the decrease of its incidence, considering both the high costs of detention and its insecure educational character.

The limits of punishment were highly increased for some crimes and especially for those crimes against property.

We have thus come to witness situations where the crimes were relatively small, but the only applicable sanction was imprisonment with deprivation of liberty, even for minor offenders whose re-education would have obviously been achieved through any of the alternative measures above mentioned.

The immediate consequence of this legislation was the overpopulation of detention places, which did not fulfil the international standards, and the substantial increase of the costs the society had to pay. What is of great concern is that the state and its institutions do not focus of minimal detention conditions, maintaining the overcrowded imprisonment areas by repressive and abusive penal policies that may be found in the following causes:

- the sentence to imprisonment of persons accused for crimes with minor prejudices; SIRDO identified 588 persons sentenced to 893 years of imprisonment for a total prejudice of US$ 6,864;
- maintaining in detention persons with psychical illness, severe chronic illness or with major handicaps (blind persons, persons who have their legs or arms amputated, etc).

(3) During the penal trial and during the execution of the sentence, any person has the right to respect of human dignity, without discrimination.

The detention measure was a very frequent one and it was proved in practice that the majority of the complains for maltreatment by the police referred especially to this period. During the 24 hours, the research officers force the prisoner to give a statement of recognition of the crime so that they proceed to gathering the proofs.

The abuses made during this period are most various, from physical violence to more subtle means of intimidation and constraint.

Such abuses are under the incidence of penal provisions, but considering the military character of the police, the exclusive authority that inquires the complains is the military prosecutor.

According to Law. 54/1993, only active officers may become military prosecutors, their selection and training being made by the Ministry of Justice and the Ministry of Defence. Military prosecutors are also bind to the military disciplinary code.

Military prosecutors have no intermediary body of assistance in the investigation, their support in the investigation being the police officers.

Thus, the independence and impartiality of military prosecutors are insecure, the number of files sending to trial police officers for abuses being insignificant compared to the number of complains forwarded to this authority, most of them being solved through decisions of non-commencement of penal research (art. 228, align 6, Penal Code), cease or dissolving the penal research.

We may conclude that the person detained subjected to maltreatment by then police will find it impossible to manage through this jungle of authorities and procedures which are not characterised by celerity.

Thus, the prosecutor continues the investigation based of what the police has already concluded, not considering the declarations of the defendant.

(4) Once the file reaches the court instance, there are few the cases when the witnesses are heard, the decision being made on the basis of the statements given by the defendants at the police office.

Very seldom the court instances exercise their active role in finding the truth, and are limited to the administration of possible proofs requested by the accusation or defence, with a tendency to consider more important the statements given by the defendant during the detention period than the statements given during the court research.

For the future, in order to avoid abuses by the police, the centres of detention under the Ministry of Interior should regain their independence, as the practice has proved that many persons who were subjected to maltreatment hesitate to talk about them even to the prosecutor, for fear they should repeat as they return in detention.

Finally, we should mention that the Order 140/1974 regimenting the conditions of preventive arrest has a secret character, and it is necessary to have a law at the disposal of the public.

(5) The right to defence is a fundamental right consecrated in various international documents.

The assistance granted by "office attorneys" proved unfunctional, this assistance being based on the simple physical presence of the attorney or signing certain statements. When the decision of preventive arrest is taken the office defence is formal, the attorney being a simple "assistant" that does not interfere during the hearing.

As the research ends, the file goes to court and the attitude of the office attorney remains unchanged.

Thus, the final conclusions presented by the attorney have a general character applicable to any of the penal causes on the role, and the attorney considers his/her mission fulfilled.

(6) In the whole of the penal trial a special category is formed by recidivists.

Anytime a crime is committed, the first investigated are those who had a previous sentence for similar crimes, their simple existence being a proof of guilt.

These persons are pressured by the research officers who make them not only admit the crime, but also to take responsibility for other similar crimes with unknown authors in the records of the police.

In the case of recidivists it is impossible to apply any alternative measure to deprivation of liberty. Thus, the preventive arrest has almost become a rule in their case and the time of preventive arrest is considered part of the sentence of detention.

The simple state of recidive is sufficient for the preventive arrest, even if information is insufficient that the defendant tries to oppose to the finding of the truth.

The transformation of the preventive arrest in a rule for the recidivists evidently harms the presumption of innocence.

We must mention that according with art. 59 Penal Code, the penal antecedents are a criteria for parole. Based on this legal ground, the commissions for parole within penitentiaries disposed the postponing of release of certain recidivists, even if all other condition for cease of sentence and behaviour during detention were fulfilled.

Thus, the position of the persons with penal antecedents related to the whole penal system is extremely precarious, legal changes been needed urgently in order to insure the respect of the presumption of innocence that should apply to recidivists, too.

SIRDO considers urgent the following measures:

- the adoption by the authorities of measures regarding the grant of amnesty (art. 119, Penal Code)
- measures for the rehabilitation of persons (art. 133, Penal Code) that suffered condemnations on the basis of penal and procedure decisions incompatible with the requests of respecting human rights and fundamental freedoms.
- the abrogation of all norms with incidence in the act of penal justice, to the extent in which they are contrary to the international regimentation on the independence of justice, its administration and the matter of impunity.

The support of the Human Rights Commission is essential in our point of view. We forward the phenomenon of "persecution by law" also to the attention of the High Commissioner for Refugees (HCR) as a possible reason invoked by persons affected by the act of justice as effect of the law for granting complementary protection, in accordance to the individual guarantees applicable to the "de facto" refugee status. We may remind that the Commission on Civil Liberties and Internal Affairs of the European Union, in its analysis on the harmonisation of the complementary forms of protection for the refugee status, situates the risk of infringing fundamental rights as a clause of exclusion in the "B" type status.

In order to clear this problem, SIRDO is available for counselling and concrete examples of cases in our records.